IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiffs in Error,
vs.
CYRUS A. MENTZER,
Defendant in Error.

No. 2298.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION.

Reply Brief

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Inasmuch as it was stipulated between the parties that oral argument is waived, and the cause should be submitted on the briefs, with the privilege on the part of plaintiffs in error to file a reply brief, plaintiffs in error make the following suggestions:

I.

Pages 1 to 11, brief of defendant in error, authorities are cited sustaining the proposition that where two or more defendants are responsible legally for the act of one of them, by reason of their relationship, it is proper to bring a joint action against both, and also where two companies are operating a railroad jointly and the negligent action of each contributes to the same injury they are both liable.

This point, even if well taken, does not answer the contention of the plaintiffs in error that in this action defendant in error was seeking to recover upon proving *separate* and *distinct torts*, based upon the operation and construction of particular engine of the separate plaintiffs in error. True, the Northern Pacific is only held liable in this case in the judgment because the verdict was against the O.W. R. R. & N. Co., but the fact remains that the plaintiffs in error were required to try two separate and distinct tort actions together in the lower court. If this was wrong the error was substantial and certainly no authority or argument is necessary in this court to show that this was wrong in law and unjust in fact.

Defendants in error offered evidence to show an independent act of negligence on the part of the Northern

Pacific Railway Co., and what it claimed was proof of other fires set by the Northern Pacific. If we should assume that the proof was admissible, which we do not think it was, the plaintiff in error, O.-W. R. R. & N. Co., was required to let the case go to the jury on proof which it was claimed by defendant in error tended to show that other fires were set by the N. P. Ry. Co. and the Great Northern Railway Co. As this tended to show that several different railroads were in the habit of setting fires it could not but be harmful when considered by the jury.

II.

Defendant in error contends that as he did not allege in his complaint the specific engines which caused the fire that proof of other fires generally thus became admissible.

The facts were plain that a particular engine was the one which defendant in error claimed caused the fire, and under these circumstances the same rule applies as would have applied if defendant had so alleged in his complaint.

This is especially true when we consider the actual situation in this case. At page 26 of the brief of defendant in error reference is made to the fact that this was the second trial of the case and reference is made to printed record pages 7 and 8, the verdict in the previous trial. We called attention to the fact that this was not

placed in the record by plaintiffs in error in our original brief. The defendant in error having evidently caused it to be placed there and at least relying upon the fact, as shown in the record, ought also to be bound by all argument that can be based thereon. Defendant in error also states that both cases were tried upon the same evidence (Answering Brief, p. 26), which is true.

This discloses that this case was first tried several months prior to the second trial. From the time of the first trial the defendant in error certainly had actual and full knowledge of what engine he was claiming caused the fire. This being so we can not see that he occupies any different position from what he would if he had alleged the fact directly in his complaint.

The case of *N. P. Ry. Co. vs. Lewis*, 51 Fed. 658, cited by defendant in error, in our opinion, is not applicable under the facts in this case. There the testimony tended to show that the fire originated from one or two locomotives and that *these* and other locomotives of defendant had set other fires.

Again, in that case the statutes of Montana were relied upon. These statutes made *prima facie* evidence of negligence that dangerous or combustible material on right of way was set upon fire eminating from the operation of a railroad.

Even if that case intended to hold that under all circumstances proof of other fires is admissible still that would not justify the introduction of evidence generally of fires set by three different railroads or two different ones without showing specifically which one of the railroads had set each of these previous fires.

The instruction given by the court, referred to at page 15 of the brief of the defendant in error, did not in any way cure this. An instruction to the jury that unless there was some evidence showing that these previous fires were set by the O.W. R. R. & N. Co. it should not consider the evidence as in any way affecting that company, did not cure the evil. The point of plaintiffs in error being that there was no sufficient evidence to justify the sub mission of this question to the jury, and if the evidence was insufficient the instruction did not justify the refusal of the court to give the instruction asked for by plaintiff in error O.-W. R. R. & N. Co. upon this point.

III.

Defendant in error contends at pages 15 and 16 of his brief that the general instruction given by the court to the effect that before the jury could find a verdict against the O.-W. R. R. & N. Co. it would have to find that the fire started from one of the engines of that company

was sufficient to justify a refusal of the court to give numbers 16 and 17, asked for by plaintiff in error O.W. R. R. & N. Co., and commented upon and set forth in full at pages 44 and 45 of our original brief. The language of these requests as asked for simply called the attention of the jury that the fact was a circumstance to be considered by them as to whether some other agency than that of the O.-W. R. R. & N. Co.'s freight train or the N. P. Ry. Co.'s passenger train crossed the fire. It seems to us that under the state of facts existing either one or both of these instructions should have been given. Evidence had been taken and submitted showing that this double-header freight train of the N. P. Ry. Co. had passed about 3:35 A. M., and the jury without the instruction requested might very well believe that this train had nothing to do with the case, the court not having given any instructions thereon, and the defendant in error not claiming any liability agaist the plaintiffs in error on account of this train, especially against the O.-W. R. R. & N. Co., the engine of which the jury found set the fire. If the instruction had been given, the jury might have found that the double-header, instead of the O.-W. R. R. & N. freight, set the fire.

IV.

At page 17 it is stated in the brief of defendant in error that the request for instructions 18 and 19, commented upon and given in full at page 45 of the original brief of plaintiffs in error, to the effect that the jury should find a verdict for the defendant O.-W. R. R. & N. Co. if the fire was not discovered or did not begin until about 3:30 A. M. were properly refused for the reason that witnesses for defendant in error testified that a spark falling in dust or saw dust, such as had accumulated on this building, might smolder several hours before bursting into flame.

We submit that this testimony was entirely insufficient for the purpose mentioned. The witnesses had no knowledge of the condition of the mill or the top of the roof and the question was not based upon any circumstance proven in the case. This testimony is found at pages 93 to 96 of printed record.

As we read the testimony there was no evidence introduced showing any state of facts existing upon which these two witnesses were interrogated. If these two requested instructions, or either of them, otherwise should have been given this testimony manifestly did not alter the situation. On the other hand, the uncontradicted evi-

dence was that everything about the mill was very dry and highly inflammable; and that the whole mill burned within a short time after 3:30. Under this evidence, and the fact that two N. P. Ry. Co. trains had passed the mill since the O.-W. R. R. & N. Co. train passed, one of these N. P. Ry. Co. engines throwing sparks, we think the instruction should have been given.

V.

On the question of the insufficiency of the evidence the defendant in error cites several cases for the purpose of showing that the evidence was sufficient to be submitted to the jury. An examination of these cases discloses that a number of them were cases in which fires originated upon the right of way of the company, sparks having set fire to combustible material permitted to gather on the right of way. Such cases have no bearing here, for the company was liable for permitting combustible material on its right of way and might be guilty of negligence without regard to the condition of its engines or its operation. Of course, there are many decisions of the court upholding sufficiency of the evidence and many to the contrary. To a large extent each case stands by itself and has to be determined by the circumstances affecting it. In

this case it does not appear to us that there is proof of negligence at all, or, if there was any, it was so extremely slight that it was overcome by the positive proof of plaintiffs in error.

The fact that witnesses Zintz and Perley testified that if the witness Ebert's testimony about escaping sparks was true the netting must have been out of repair and there must have been holes therein large enough for these sparks to escape, did not add anything to the situation in the case. The testimony of plaintiff in error, O.W. R. R. & N. Co., showed a perfect netting and it was manifest that if this testimony was true that sparks as large as a dime would not and did not escape. But Ebert's testimony upon this was merely an estimate or guess at long range, and was not sufficient to overcome positive proof.

If the testimony in this case is sufficient to justify its submission to the jury, it seem to us that it is hardly possible to conceive a case that should not be submitted to the jury, when it involves the question of fire being started by sparks from an engine. It practically brings the courts to the point that the jury must in all cases be the absolute judges of the matter, and their verdicts may

be based on and sustained by evidence amounting to mere guesses and surmise, as against positive, uncontradicted evidence showing the guess or surmise to be untrue.

VI.

Defendant in error, at page 26 of his brief, says that this case has been tried upon the same evidence before two juries and each found for the plaintiff, and that, therefore, the court would be justified in regarding this test as conclusive. If the evidence was legally insufficient to go to the jury we can not see how this argument should have any weight. It might also be said, two juries in the *Allen* case, referred to in our original brief, and in the motion for a new trial, upon the same state of facts, returned verdicts for the plaintiffs in error; and also another jury in the case of *Horn Bros.* versus the same defendants, based upon the same evidence, returned one verdict for plaintiffs in error. This was the only verdict in that case as no new trial was asked for or granted.

CONCLUSION.

In conclusion we again respectfully submit that for

errors presented in our original brief the case should be reversed and a new trial granted.

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